ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
ANDREE LAYTON ROAF, Judge

DIVISION III

CACR05-1111

August 30, 2006

CARL EDWARD WILLIS

APPELLANT

v.

STATE OF ARKANSAS

APPELLEE

APPEAL FROM SEBASTIAN COUNTY CIRCUIT COURT
[NO. CR-2004-1370, 1041]

HONORABLE J. MICHAEL FITZHUGH
CIRCUIT JUDGE

AFFIRMED

A jury convicted appellant Carl Edward Willis of the second-degree sexual assault of nine-year-old A.I. and sentenced him to twelve years' imprisonment. Willis now appeals, asserting that the trial court erred when it denied his motion in limine to exclude the testimony of S.H. and S.W. as to Willis's similar prior bad acts; when it allowed improper victim-impact testimony from A.I.'s mother; and when it denied Willis's request to invoke "the rule" during a pre-trial hearing. We find no error and affirm.

Willis was charged with the second-degree sexual assault and rape of nine-year-old A.I., ten-year-old S.H., and his daughter, eight-year-old S.W. The cases were to be tried separately. During an August 4, 2005, pre-trial hearing on the charges pertaining to A.I., defense counsel argued a motion in limine to exclude the testimony of S.H. and S.W., arguing that their testimony could not be included under the 404(b) pedophile exception because A.I. and S.H. did not live in the same household as Willis and the State had not met its high burden of persuading the court that the allegations made by the three girls were sufficiently similar. In addition, defense counsel argued that

allowing the children to present testimonial evidence would be substantially more prejudicial than probative as prohibited by Rule 403.

In order to rule on the motion in limine, the court held another pretrial hearing on August 10, 2005, to hear the testimony of the three girls. Defense counsel requested that when one child was testifying, the other two be excluded from the courtroom. The prosecution argued that all three children were the alleged victims, and that the rules allow victims to be present during all the testimony. Defense counsel argued that, in this trial, only A.I. should be considered the victim and the other two girls were simply witnesses. The court refused to exclude the children from the courtroom.

During this hearing, A.I. testified that she knew S.W. through cheerleading and that she had slept over at S.W.'s house one night. She went on to testify:

> There is something that happened with Carl Willis. He touched me in my privates. It happened at the house when I spent the night with [S. W.]. It happened three or four times. He touched me with his finger and his hand. He touched me with his hand through my panties on my butt. On other times, he touched me in the front of my hole, in the front of my privates and my back hole.

S.H. testified that she and S.W. were friends, and that something happened with S.W.'s father, Carl Willis. She stated that while she was at his apartment, Willis touched her on her shorts. She further stated:

> I do not know if he touched me through my shorts and panties. His skin touched my skin. His fingers touched my privates. It happened while I was sitting on his lap. He stuck his finger up my shorts. I was sitting on his lap because me and [S.W.] were asking him if we could have some candy. He told me to sit on his lap so I did. I remember we were in his room. The skin of his finger touched the skin of my privates. That is the truth.

S.W. testified as follows:

> I used to live with my dad. His name is Carl Willis. I do not live with him anymore. Something happened with me and Carl Willis. He would touch me in my private part. It would happen when we were in my mom's bedroom. My mom was not there. It happened about five or ten times. It happened more than once. I know that this happened. I am not making this up. I did not dream it. This happened like last summer, the summer of 2004.

There was some confusion as to whether these violations occurred in the summer of 2004 or 2003. The information was orally amended to reflect that the charges were actually being brought for the events of the summer of 2003.

After the testimony, defense counsel argued that the State was attempting to use the pedophile exception merely to "cobble together what might be characterized as three weak cases into one that can result in a conviction." The court denied the motion in limine, finding that the girls understood the difference between right and wrong and were competent to testify; that the intimate relationship contemplated under 404(b) does not require that the child live in the defendant's home or that the crime be committed there; that the offenses were similar; that all of the offenses occurred in Willis's household; and that the victims were substantially younger than Willis and an intimate relationship between Willis and the children did in fact exist.

The jury selection process began immediately after the pre-trial hearing. During the trial, A.I. gave essentially the same testimony she had provided at the pre-trial hearing, adding that the offenses happened more than once at Willis's house on O Street and occurred on one occasion in the living room when Willis's three sons were present. A.I. also stated that she could not remember what clothes she was wearing, but that she knew that she felt Willis's fingers because she felt his fingernail.

A.I.'s mother testified that in the summer of 2003, she allowed her daughter to go to the Willis household on numerous occasions because A.I. and S.W. were involved in cheerleading together. She stated that sometimes, on the weekends, A.I. would spend the night. She testified that in October 2004, A.I. initially denied being abused by Mr. Willis, but after seeing Willis at church one night, A.I. admitted that she had lied. They immediately went to the police station to give a statement. A.I.'s mother stated that she was prompted to ask her daughter about any abuse after S.W.'s mother informed her that Willis had abused S.W.

Detective Michael McCoy testified that he originally took the statement from A.I. on October 26, 2004, and that he believed her. Sue Stockton, a forensic nurse examiner at the Children's Safety Center in Springdale, testified that she conducted an exam on A.I., but found no forensic evidence of abuse. She also testified that she would not have expected to find anything because she did not see A. I. until approximately fifteen months after the alleged incidents.

S.H. provided essentially the same testimony as she had given during the pre-trial hearing, stating that Willis pushed her panties aside and touched her on her private parts and that it made her feel weird. She stated that she told her mother what happened after they saw Willis on the news being arrested for touching S.W. and her mother asked her, "Did Carl ever touch you?"

S.W. also provided testimony similar to that given at the pre-trial hearing. She stated that the offenses happened five to ten times and that she tried to stop Willis, but he would not stop. She stated that Willis told her not to tell anybody and that it made her feel scared.

Two of Willis's sons, aged thirteen and fifteen, testified that although they knew A.I., she did not come to their home at all in 2003, and that when she did come in 2004, she was never alone with their father and that they never saw Willis touch her in an inappropriate way. Willis testified that he never once touched A.I. inappropriately, either purposefully or accidentally. He also testified that S.H. was lying and that he did not even live in the home where S.H. claimed she was abused in 2003 but only went there to check mail. Willis also testified that he had raised his daughter for eight years. He did admit, "I may have inadvertently touched her. I mean, she was my daughter," but stated that he had never intentionally harmed her or touched her in an inappropriate manner.

After deliberation, the jury found Willis guilty of second-degree sexual assault against A.I. and not guilty of rape. During the sentencing stage, A.I.'s mother gave a victim-impact statement. She testified as follows:

> What hurts me the most is the one thing I have always prayed: that my child be spared the pain I went though. You see, I was also once a victim of sexual abuse. I cannot put into words the guilt I will forever carry in my soul for being so trusting. One thing that will change me forever is I will now always think the possible bad about people instead of the good. This has affected my job, my marriage, and just the simple things like my train of thought. I will always have a nightmare in my head about what was done to her. It is like a horror picture in my head playing over and over for me to visualize and I just can't turn it off. I ask you to imagine something really bad happening to someone you love and then having to see it in your head over and over. Parents are supposed to protect their child and it is too late for me. To tell you the truth, I really don't want to ever let her spend the night with a friend again. Mr. Willis, I trusted you with my child and once considered you friend. You once told me that I shouldn't be so trusting. I didn't realize your were warning me about yourself.

Willis first argues on appeal that the trial court erred when it allowed S.H. and S.W. to testify under the pedophile exception to Rule 404(b) because the testimony was more prejudicial to him than probative.

It is within the sound discretion of the trial court to admit or reject evidence of other crimes or wrongs, and the reviewing court will not reverse the lower court's decision absent a manifest abuse of discretion. *Hernandez v. State*, 331 Ark. 301, 962 S.W.2d 756 (1998). Abuse of discretion is a high threshold that requires more than mere error in the trial court's decision, but that the trial court act improvidently, thoughtlessly, or without due consideration. *Grant v. State*, 357 Ark. 91, 161 S.W.3d 785 (2004).

Relevant evidence is defined as that evidence tending to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. Ark. R. Evid. 401 (2005). All relevant evidence is admissible except where otherwise provided by statute, the rules of evidence, or other court rules. Ark. R. Evid. 402. According to Rule 403 of the Arkansas Rules of Evidence, evidence that is relevant may nevertheless be excluded if its probative value is *substantially outweighed* by the danger of unfair prejudice, issue confusion, misleading the jury, or undue delay. (Emphasis added.) Evidence of other crimes or wrongs is generally not admissible to prove the character of the defendant in order to show that he acted in conformity therewith; the evidence may, however, be admitted for other purposes such as to demonstrate proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Ark. R. Evid. 404(b).

When the charges concern the sexual abuse of children, the "pedophile exception" allows evidence of other sexual offenses to show motive where the other offenses involve a similar act of sexual abuse of children and where the evidence shows a proclivity toward a specific act with a person or class of persons with whom the accused has an intimate relationship, such as where the victim lives with the defendant in the same home or where the offenses occurred in the defendant's home. *See Parish v. State*, 357 Ark. 260, 163 S.W.3d 843 (2004); *Pickens v. State*, 347 Ark. 904, 69 S.W.3d 10 (2002). Evidence of a prior similar offense in cases where the charge involves

unnatural sexual acts shows that the accused has a depraved sexual instinct. *Spencer v. State*, 348 Ark. 330, 72 S.W.3d 461 (2002).

The focal point of the inquiry is relevancy; in order to determine relevancy, the court looks at several factors to determine the probativeness of evidence of a prior crime: (1) whether there was a time interval between the crimes; (2) whether there was a similarity of the acts; (3) whether there was an intimate relationship between the victim and the perpetrator. *Parish*, *supra*.

At the trial level, Willis argued that the testimony of S.H. and S.W. should be excluded because it did not fit into the pedophile exception and because the prejudicial value of the testimony substantially outweighed its probative value. On appeal, Willis has abandoned his claim that the challenged testimony does not fit into the pedophile exception and focuses only on the Rule 403 objection. *See Jordan v. State*, 356 Ark. 248, 147 S.W. 3d 691 (2004) (holding that an argument made at the trial level but not continued on the appeal is effectively waived). Therefore, the sole issue for this court to decide in regard to the motion in limine is whether the testimony of S.H. and S.W. was substantially more prejudicial than probative.

Willis relies on the concurring opinion in *Anderson v. State*, --- Ark. App. ---, --- S.W.3d --- (Dec. 14, 2005) (Roaf, J., concurring), to support his proposition that the pedophile exception does not leave room for a sincere effort at performing the 403 balancing test:

> Rule 403 is supposed to provide the necessary "parameters" for this balancing act. In response to an objection that evidence is unfairly prejudicial, the probative value of the evidence must be weighed against the danger of unfair prejudice. What parameters could they possibly have reference to? The Advisory Committee Note to Rule 403 explains that "unfair prejudice" within the context of the rule means "an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.

This case, however, is distinguishable from *Anderson*. There, Anderson objected to the court allowing the victim to testify regarding prior sexual bad acts that Anderson had performed on her in another county and allowing the State to introduce evidence that Anderson had already pled guilty and been convicted of sexual assault against the same victim in another county. The concurring opinion simply expresses a concern that the introduction of such information could be considered extremely prejudicial, especially because it was merely cumulative and not necessary to the State's

case - allowing a jury to learn that a defendant has been convicted elsewhere for committing the same act against the same victim leaves the door wide open for the jury to make an improper emotional, rather than factual, decision.

Here, the evidence was not merely cumulative and highly prejudicial, but was also highly probative. In considering the factors used to determine probativeness, there was no significant time interval between the alleged crimes; the acts described were sufficiently similar; and there was an intimate relationship between the victims and the perpetrator. First of all, although the time line was a little hazy for the children, all three girls testified that the alleged sexual assaults occurred sometime between summer 2003 and summer 2004. *See, e.g.*, *Douthitt v. State,* 326 Ark. 794, 935 S.W.2d 241 (1996) (refusing to sever appellant's rape counts from his incest counts, although there was a significant time gap between the alleged rapes and the alleged incest). Secondly, all three victims testified that Willis touched them in their private areas, "skin to skin" and that the acts occurred in his home. Finally, Willis had an intimate relationship with all three victims. According to *Parish*, *supra*, an intimate relationship is defined as "close in friendship or acquaintance, familiar, near, or confidential." *Id*. at 269. An intimate relationship does not necessarily require that the child and the accused be related or live in the same home, as an intimate relationship has been found where the child was an overnight guest in the accused's home, where the perpetrator babysat the victim, and where the accused gained access to the victim. *Id*. S.W. was clearly in an intimate relationship with Willis because she is his daughter. S.H. testified that she and S.W. were friends and that she had often visited the Willis home. A.I. also testified that she and S.W. were friends and that she spent the night at the Willis household on at least one occasion.

This case is similar to *Hernandez*, *supra*, where our supreme court found that the trial court did not err in allowing a minor witness to testify that Hernandez had sexually abused her at the trial for the rape of his stepdaughter, where only two years had passed between the abuse of the witness and the stepdaughter, where the allegations by both girls were sufficiently similar, and where an intimate relationship existed because the witness testified that she knew the family and had been allowed to spend the night at Hernandez's home. The court stated that by requiring the probative

value of the evidence to be weighed against the danger of unfair prejudice in response to an objection that evidence is unfairly prejudicial, Rule 403 automatically provides the necessary parameters for admission of evidence pursuant to the pedophile exception. *Id*. The proper standard of review is abuse of discretion, and the court found that there was no abuse where the probative value of the evidence outweighed the danger of unfair prejudice because the evidence involved similar crimes that occurred in the Hernandez home against children of similar ages. *Id*.

We cannot say that the trial court abused its discretion when it decided that the prejudice did not substantially outweigh the probative value and allowed S.H. and S.W. to testify to prior similar sexual misconduct by Willis, especially where the acts occurred around the same time, in a similar fashion, and in Willis's home, and where Willis denied that he committed any inappropriate touching of A.I.

Willis's second argument on appeal is that the victim impact statement read by A.I.'s mother was highly prejudicial and should not have been allowed, especially when she stated, "You once told me that I shouldn't be so trusting. I didn't realize you were warning me about yourself."

Evidence relevant to sentencing may include victim-impact statements. Ark. Code. Ann. § 16-97-103 (4) (Repl. 2006). Before imposing a sentence, the court shall permit the victim to make a statement "concerning the effects of the crime on the victim, the circumstances surrounding the crime, and the manner in which the crime was perpetrated." Ark. Code Ann. § 16-90-1112 (Repl. 2006). A member of the victim's family is allowed to give the statement if the victim is a minor. Ark. Code Ann. § 16-90-1114 (Repl. 2006). The rules of admissibility and exclusion of evidence apply to the evidence presented during the sentencing phase, including the victim-impact statements. *Walls v. State*, 336 Ark. 490, 986 S.W. 2d 397 (1999). The trial court's decision to admit evidence is subject to an abuse of discretion standard. *Buckley v. State*, 349 Ark. 53, 76 S.W.3d 825 (2002). In addition, this court will not reverse absent a showing of prejudice to the appellant, *Edwards v. State*, 70 Ark. App. 127, 15 S.W.3d 358 (2000); and when a defendant receives a sentence within the statutory range, he cannot prove that he was prejudiced. *Buckley*, *supra*.

The victim-impact statement, taken as a whole, merely told the jury of the emotional consequences of Willis's actions. The trial court did not abuse its discretion by allowing A.I.'s mother to testify about the effect Willis's crime had on their lives. Even if Willis could prove that the court abused its discretion, he cannot demonstrate prejudice because his sentence of twelve years was well under the maximum of twenty years requested by the State.

Willis's final argument on appeal is that the trial court erred when it refused to exclude S.H. and S.W. from the courtroom while A.I. was testifying during the pretrial hearing. According to Rule 615 of the Arkansas Rule of Evidence, "At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of the other witnesses." Willis claims that the presence of S.H. and S.W. in the courtroom during the pretrial testimony essentially allowed the children to shape their testimony by listening to the questions and answers given by A.I.

Rule 1101 of the Arkansas Rules of Evidence provides that the rules of evidence are inapplicable to "questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104(a)." Rule 104(a) states that, except with respect to privileges, the court is not bound by the rules of evidence when making preliminary determinations involving the qualification of a person to be a witness or the admissibility of evidence. This court will reverse a trial court's ruling on admissibility of evidence under Rule 104(a) only if there is an abuse of discretion. *E.g.*, *Marx v. State*, 291 Ark. 325, 724 S.W.2d 456 (1987).

Willis relies upon *Cook v. State*, 274 Ark. 244, 623 S.W.2d 820 (1981), where our supreme court held that the trial court erred in not granting a mistrial after a rape victim disclosed that the prosecutor had held a "pretrial conference" which was attended by all of the prosecution witnesses, some voluntarily, some under subpoena. However, the court focused on the prosecutor's misuse of the subpoena power and noted that Rule 615 was not technically applicable because it is only appropriate "during an evidentiary hearing presided over by the court and there is no requirement to sequester witnesses by either party during the investigation or preparation of a case." *Id*.

In this case, the trial court reasoned that ascertaining the children's ability to testify about Willis's proclivity towards sexually abusing young girls during a pre-trial hearing was a question of

fact preliminary to the admissibility of evidence. While the better policy would have been to simply excuse the children from the courtroom during each other's testimony, existing law does not prohibit the children remaining in the courtroom during the pre-trial. Therefore, the trial court did not abuse its discretion in failing to allow Willis to invoke "the rule." In addition, Willis cannot demonstrate prejudice, especially in light of the fact that the court allowed Willis to invoke Rule 615 during the actual trial, and the witnesses were subject to cross-examination by his attorney.

Affirmed.

BIRD and BAKER, JJ., agree.